ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capacity	)	

REPLY COMMENTS OF HYPERION TELECOMMUNICATIONS, INC. ON NOTICE OF PROPOSED RULEMAKING

Hyperion Telecommunications, Inc. ("Hyperion"), through undersigned counsel, hereby submits its Reply Comments on the Notice of Proposed Rulemaking released August 7, 1998, on various issues relating to deployment of wireline services offering advanced telecommunications capability.

DISCUSSION

I. CONTRARY TO ILECS' CONTENTIONS, AN ADVANCED SERVICES AFFILIATE WOULD BE A "SUCCESSOR OR ASSIGN" SUBJECT TO SECTION 251(C) IF THE INCUMBENT TRANSFERS TO IT THE RIGHT TO USE THE INCUMBENT'S BRAND NAME OR ANY OTHER SIGNIFICANT ASSET USED IN THE INCUMBENT'S LOCAL EXCHANGE BUSINESS.

Several incumbent local exchange carriers ("ILECs") deny that ILECs' advanced service affiliates would be ILECs for purposes of Section 251(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(c). In this manner, they seek the green light to use a separate advanced services affiliate as a means of shielding their advanced services operations from the

mission-critical interconnection, unbundling, resale and other obligations imposed on ILECs by Section 251(c). Their efforts must be rejected by the Commission.

Section 251(h) extends the competitive open-access obligations of section 251(c) to any entity that becomes a "successor or assign" of an incumbent after the date of enactment. As demonstrated in Hyperion's Initial Comments filed herein, any affiliate receiving an assignment of significant assets utilized by the incumbent in its provision of local telephone exchange service is an "assign" within the literal meaning of that term.[1] Hyperion also demonstrated that even if the focus is on the term "successors" rather than "assigns," an affiliate receiving an assignment of significant assets used in the incumbent's local exchange business is within the coverage of Section 251(h). As one important example, Hyperion showed that authorization of the affiliate to use the incumbent's brand name represents the assignment of a significant business asset, making the affiliate an "assign" under Section 251(h).[2]

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[1] As Hyperion showed, the accepted definition of "assigns" is "assignees; those to whom property is, will, or may be assigned." *Black's Law Dictionary* (6th ed. 1990). There is nothing in Section 251(h) to show that Congress intended anything other than the accepted definition of "assigns" when it used that term in Section 251(h).

[2] This Commission has recognized the crucial significance that "brand name assets" play in the business of providing local exchange and exchange access services. *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, ¶ 105 (1997). As Hyperion pointed out in its Initial Comments herein, an advanced services affiliate that is able to utilize the incumbent's brand name will continue be regarded by consumers as part of the incumbent. It will have an automatic advantage in marketing to consumers who already use the incumbent for local service and want advanced services as part of a single package sold by one telephone company — indeed, if this were not true, the ILECs would not have such a strong desire to allow the affiliates to use their names. As long as the incumbent companies are utilizing their control over the local network to dominate the local exchange market for conventional circuit-switched voice services, any advanced data affiliate that can link itself to the incumbent through the incumbent's brand name will be able to take anti-competitive advantage

It is clear that the ILECs envision assigning significant assets to their advanced service affiliates (*e.g.*, Bell Atlantic Initial Comments at 43; CBT Initial Comments at 15; GTE Initial Comments at 43; SBC Initial Comments at 7) and several of the ILECs expressly intend to assign to such affiliates the rights to use the well-established ILEC brand names (*e.g.*, Bell Atlantic Initial Comments at 31; CBT Initial Comments at 17; GTE Initial Comments at 45-46). Accordingly, such affiliates would patently be "successors or assigns" of the ILECs, and, pursuant to Section 251(h), would be subject to the requirements of Section 251(c).

Any provision of advanced data services through ILEC affiliates that are not subject to Section 251(c) open access obligations involves significant risk of undermining the pro-competitive policies of the Act. The ILECs make no bones about their plans to provide the affiliates with significant equity financing from the incumbent or its holding company (*e.g.*, Bell Atlantic Initial Comments at 32; GTE Initial Comments at 44; NCTA Initial Comments at 5) and, obviously, the affiliate will be operated for the benefit of the ILECs' shareholders. Unless it is prevented from doing so, the incumbent will have strong incentives to discriminate in favor of the affiliate. As borne out by the recent history of difficulty in implementing local exchange competition, these incentives to discriminate are likely to result in significantly delaying the enforcement of open access and non-discrimination obligations. As time passes, an increasingly large portion of the local exchange network will be devoted to advanced services. For all these reasons, it is essential that the Commission not allow the ILECs to twist the policy of promoting advanced services into a weapon to thwart the competitive goal of Section 251.

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of the incumbent's continuing bottleneck control of the local network — extending the incumbent's control to advanced services, in clear violation of the policy of Section 251(c).

II. THE ILECS HAVE FAILED TO JUSTIFY A *DE MINIMIS* EXCEPTION FOR TRANSFERS OF NETWORK EQUIPMENT.

Some ILECs have seized upon the Commission's request for comment on whether there should be a *de minimis* exception to Section 251(h) for transfers of network equipment, possibly limited to equipment already owned or ordered by the incumbent. NPRM ¶¶ 108, 109; Ameritech Initial Comments at 57; SBC Initial Comments at 6. These ILECs would construe "*de minimis*" to cover *any* transfer of equipment other than equipment used solely for providing non-advanced services. *Id.*

As Hyperion showed in its Initial Comments, even a true *de minimis* exception would serve no legitimate purpose. As to equipment acquired in the future, there would be no reason to allow equipment destined for the affiliate to be funneled through the incumbent, even on a *de minimis* basis — the separate affiliate itself can simply purchase the equipment.

Nor would a *de minimis* exception serve any legitimate purpose as applied to equipment that the ILEC has already purchased or ordered. As the Commission has noted, the ILECs have previously argued that giving competitors open access to advanced service facilities "reduce[s] their [*i.e.*, the ILECs'] incentive to invest in these new facilities" (NPRM ¶ 10), and they renew that argument here (*e.g.*, Bell Atlantic Initial Comments at 20; CBT Initial Comments at 42; GTE Initial Comments at 106; US West Initial Comments at 9). But that argument applies (at most[3])

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[3] The argument also proves too much. It is merely a special case of the general (and obvious) proposition that a firm will have a greater incentive to make an investment if it can use that investment to engage in monopolistic practices (such as expanding its bottleneck control) than if it must face true competition for the services to be provided using the investment. But this is no reason to vitiate the safeguards that are designed to prevent the firm from engaging in such practices.

only to equipment purchased in the future -- which, as noted above, can be purchased directly by the affiliate. As to network facilities already purchased or under order by the ILECs, the ILECs have already made their investment decisions in a framework in which the open access obligation of Section 251(c) clearly applies. There is thus no reason for the Commission to deviate from its prior ruling that transfers of network facilities to an affiliate render that affiliate an incumbent under Section 251(h). *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, ¶ 309 (1996).

As Hyperion pointed out, even the distinction framed in the NPRM between *de minimis* transfers and "wholesale" transfers - allowing one and disallowing the other - creates the prospect of ambiguity, confusion and opportunities for gaming and outright evasion. Yet the ILECs would widen the *de minimis* category to include nearly all transfers between the ILEC and its affiliate. Since there is no good reason for allowing an exception -- regardless of the size of the transfer or when the equipment was purchased -- the Commission should adhere to its present rule that all transfers of network equipment subject to transferee affiliate to Section 251(c) open access obligations. It should not adopt a *de minimis* exception, and *a fortiori* should emphatically reject the ILECs' desire for an exception that swallows the rule.

III. THE RBOCS HAVE NOT JUSTIFIED EXPANDING LATA BOUNDARIES TO PERMIT THEM TO PROVIDE HIGH-SPEED INTERLATA ACCESS TO NETWORK ACCESS POINTS IN OTHER LATAS.

Several RBOCs ask the Commission to modify LATA boundaries to enable them to carry traffic from LATAs without network access points to the nearest network access point. According to the RBOCs, this will avoid redundant facilities, allow cost savings and allow the RBOCs to offer "one-stop shopping" to their customers. *E.g.*, Ameritech Initial Comments at 62,65; US West Initial Comments at 50, 54.

As Hyperion noted in its Initial Comments herein, Section 3(25) of the Act sets forth no standards for modification of LATA boundaries. But, as Hyperion showed, that does not mean that the Commission has standardless discretion to modify LATAs whenever it believes such modification might represent desirable policy. Rather, the structure and history of the Act, supported by the Commission's actions to date in interpreting the Act, provide concrete evidence that Congress intended to incorporate the standards followed by the District Court in ruling on requests for modifications of LATA boundaries under the Consent Decree. In essence, Section 271 has replaced the Consent Decree; and the LATA modification provision of Section 271, like the parallel Consent Decree modification procedure, was not intended to allow "piecemeal dismantling" of interLATA restrictions.[4] The Commission itself has cited the standards followed by the District Court in determining whether to approve requested LATA modifications. *Petitions for LATA Association Changes by Independent Telephone Companies,*

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[4] As Hyperion noted, the LATA concept — and the LATAs themselves — derive from the AT&T Consent Decree, which is specifically referenced in Section 3(25). As the Commission recognizes, the District Court that issued the AT&T Consent Decree had a procedure for considering modification requests, and approved several modifications. *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, 12 FCC Rcd 10646, ¶ ¶ 3-8 (1997) ("*LATA Boundary Decision*"). This history supports the conclusion that, as part of incorporating the LATA structure established by the AT&T Consent Decree, Congress intended to incorporate the standards followed by the District Court in ruling on requests for modifications of LATA boundaries under the Consent Decree. Such a conclusion is reinforced by the fact that the LATA boundaries are the central definitional element in administering Section 271's restriction on BOC provision of interLATA service. Congress strictly limited the Commission's discretion in allowing exceptions to Section 271: Section 10(d) prohibits the Commission from forbearing to apply the requirements of Section 271 until they have been fully implemented; and Section 271(g) has only a very limited definition of "incidental interLATA services" exempt from those requirements. In light of these limitations, the Commission was clearly correct in concluding that it could not grant LATA modification requests that are "functionally no different" from requests to forbear from applying Section 271 to the provision of particular types of services. NPRM ¶ 82.

12 FCC Rcd 11769, ¶ 12 (1997). Application of those standards leads to the conclusion that the relief requested by the RBOCs is not warranted, but would in fact damage competition.

Under the AT&T Consent Decree, the District Court approved modification of LATA boundaries in basically two situations: (1) for "traditional local telephone service between nearby exchanges," under flat-rate non-optional plans, where "the competitive effects were minimal and a sufficient community of interest across LATA boundaries was shown" (*see LATA Boundary Decision*, ¶ ¶ 7, 8, and District Court decisions summarized therein); and (2) for independent telephone companies seeking to upgrade their networks in a manner that would require routing traffic through a BOC switch in a different LATA (*see Petitions for LATA Association Changes by Independent Telephone Companies*, 12 FCC Rcd 11769, ¶ 5 (1997), and District Court decisions summarized therein).

Under these tests, the Commission's proposal to allow LATA boundary modification to enable provision of advanced services on an intraLATA basis to a single school district straddling LATA boundaries (NPRM ¶ 86), for example, is similar to the "community of interest" situation in which the District Court authorized LATA boundary modifications. In such a situation, no competitive injury is likely, and no dismantling of the basic Section 271 interLATA restriction is involved.

On the other hand, LATA boundary modifications to enable a BOC to reach network access points in another LATA would be much broader in scope. In its Initial Comments, Hyperion presented information that approximately 43% to 78% of persons residing in the United States have access to the Internet at something less than DS3 connection — the standard urged by the RBOCs for determining when LATA boundaries could be breached. Granting the

relief the RBOCs seek would be more than simply fine-tuning particular geographical boundaries to recognize particular communities of interest. Instead, it would allow broad BOC entry into a substantial — and growing — segment of the market for interLATA services. In effect, the proposed action would add to the list of interLATA services exempt from Section 271 that Congress established in Section 271(g). That would be outside the scope of the Commission's authority under Section 3(25).

In any event, such relief is not needed. If there is demand in a particular area for high-speed access to an out-of-LATA network access point — whether that demand comes from the private sector or from public subsidies — the IXCs have every incentive to identify that demand and fulfill it. Conversely, if none of the IXCs in the marketplace has recognized sufficient demand for such high-speed access to justify the cost of constructing such access, it appears unlikely that the RBOCs can justify such construction unless a cross subsidy is involved.

The market for high-speed access interLATA transmission is exploding in this country, and several carriers are building networks to attempt to meet this demand. It is understandable that the RBOCs are anxious to participate in this market, as they are for other aspects of the interLATA market. But it is not the RBOCs' anxiety, or even the vague policy grounds they cite in their comments, that governs the manner in which RBOCs are to be permitted to enter the interLATA market. Rather, RBOC entry into the interLATA market is governed by the process set forth in Section 271 — a process which, by requiring the RBOCS to cooperate in opening local markets to competition, will benefit consumers in all areas of the country. To be authorized

to provide high-speed interLATA access to the Internet, what the RBOCs must do is comply fully with Section 271 — not continue to create excuses for why the Section 271 requirements should not apply to one or another case.

Respectfully submitted,

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October 16, 1998

CERTIFICATE OF SERVICE

I, Patrick J. Whittle, hereby certify that I have on this 16th day of October, 1998, caused copies of the foregoing Reply Comments of Hyperion Telecommunications, Inc. to be served on the following via hand delivery:

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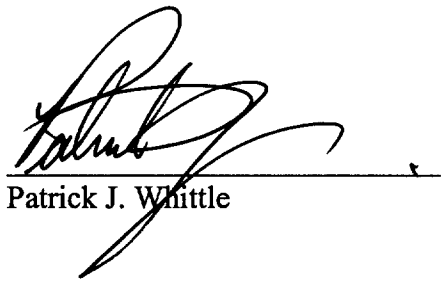

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